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## CONVEYANCING CONSIDERED AS A PROGRESSIVE SCIENCE.

The practical working of the business of land transfer and lien upon agreement of sale or mortgage—conveyancing—is based upon law which has ever since the first settlement of Pennsylvania been gradually improving in simplicity and justice as a progressive science. The law providing for the recording of deeds, and that until recorded they should only bind the parties and their representatives, was an immense step in the direction of certainty of ownership and security to the purchaser in good faith. The act of limitations of 1785, with its subsequent amendments, was another great improvement, the law limiting the lien of decedent's debts, still further limited by later enactments, the law preserving the lien of mortgages from discharge by judicial sale on junior liens, the Price Act, simplifying sales by trustees, the abolition of the estate tail; all these laws have tended to make land more valuable by making it more salable, with the title of the purchaser more free from doubt and with greater security to the mortgagee. When the writer began his legal studies, and for some years afterwards, the only way of examining land titles was by making briefs of title and ordering sets of searches of the records for adverse judgments and liens. If the brief was deficient, or there was any doubt about the lawful efficiency of any of the acts of transfer shown by the brief, the matter was laid before conveyancing counsel and an opinion obtained. If the property was valuable, this precaution was often taken when the conveyancer was not in doubt, but desired that the purchaser should feel more secure. To the caution of the old conveyancers and to the skill and learning of the conveyancing counsel of those days it is largely due that the land titles in Philadelphia are generally good, and the business community of to-day owes a heavy debt of gratitude to the long line of con-

veyancers and counsel, of whom the last was the brilliant coterie composed of Horace Binney, Eli K. Price, Joseph B. Townsend, J. Sergeant Price, Henry Wharton, Edward Olmsted and E. Coppee Mitchell. These improvements have been followed by the present system of corporate title insurance which is now so universally used that the old practice has been completely abandoned, and which is so well understood that it is needless to describe it. Thus the legal system of land conveyance in this city is a progressive science, the constant tendency being to increase the security of the investor, while the improved business methods have greatly diminished the expenses of sales and mortgages; but as it has not yet reached perfection, it may be well to consider some of the possibilities of further progress.

A striking danger to purchasers and mortgagees is the unrecorded lien, such as the mechanic's lien, and the lien of decedent's debts, and the general or unspecified lien of the judgment in personal actions, which, although matter of record, is not entered specifically on any locality index.

As to the mechanic's lien, as it may be entered at any time within six months after the work is done or the materials furnished, the possibility of this lien being recorded after transfer is completed and the consideration money fully paid, enters as an embarrassment into every negotiation for the sale or mortgage of improved property, and in view of the large number of mechanics who every year buy homes for themselves, this law, supposed to be for the benefit of the working man, really does him far more harm than good. It is also bad because it is necessarily so limited in its operation as to bestow an unfair advantage on a very small class of persons. Under the guise of legislation, general in form, it is really class legislation of the most offensive kind, and the best interests of the working man, the purchaser of land, and of the lender of money on mortgage, demand that the mechanic's lien law should be repealed.

The lien of decedent's debts, which, under the last

statute on the subject, expires two years after the death of the decedent, and may be discharged earlier by an order of the Orphans' Court, on petition showing that the personal estate is amply sufficient, is in a very different position. It would work injustice of a very serious kind if the heir could defeat the creditor of his decedent by selling and conveying the lands inherited. The lien may possibly cause hardship to the innocent, or rather the heedless, purchaser; it is more likely to delay business activities until the lien has expired, or been discharged by the Orphans' Court on petition. The German law, which has recently been adopted in England, places the title of the decedent's realty in his executor, or administrator, pending the settlement of the estate. If the value of the land is needed to pay debts, or if an advantageous offer is made for its purchase, the proper court can order a sale, the purchase money taking the lien of the decedent's debts and standing in the estate in place of the land conveyed. In this way the rights of the purchaser, creditor and heir are all adequately protected. If the land is not sold, the court, on final settlement of the estate, the decedent's debts and the inheritance taxes being paid, enters a decree which identifies each successor to the realty of the decedent, and conclusively finds the estates and interests of all persons succeeding thereto, with a list or inventory in detail of the lands. Bearing in mind that another very serious danger of the purchaser is that in this State titles by descent are not required by law to be recorded, and generally are not, it would seem that the above law is worth careful consideration.

As to the lien of judgments in personal actions, a judgment entered on the lawful index against "John Smith" is a lien for five years from its rendition against the real estate of the defendant. It is also a hindrance and embarrassment as to every mortgage and sale of every piece of ground in the county owned by other persons named "John Smith," all of whom have to show clearly that the lien does not apply to their lands, the subject of negotiation. The law on this point works a hardship

in closely populated districts far greater than the benefit which it bestows in the increased security of the judgment creditor. It is difficult to perceive any reason or principle in favor of the law that judgment is a lien on real estate from the date of its entry, but does not attach to personal property until it is levied upon under execution. In England the judgment binds realty and personality alike from the levy of execution. In Germany, Austria and Hungary the judgment is a lien on each piece of realty of the defendant from the time of its notation upon the official land register of each property. This notation may be made at any time after the judgment is entered on petition to the Land Court on which a judicial order directing the notation is made. The legal effect of the notation is to enter a lien against the particular lot of ground in the Register, taking priority as against other liens according to the date of entry. The general rule as to land liens in Europe seems to be that they must be duly entered in a judicial record, and thereupon have precedence according to the date of recording. It would be in harmony with this principle to adopt the English rule, as above stated, with the further amendment that the Sheriff should, on the day of levy, file a copy thereof in the proper court, to be entered at once on the lien or locality index, as a lien from the date of the entry, thus giving the means of notice to inquiring investors of money.

The above suggestions are in the line of progress, as strengthening the security of the holder for value, but it remains to be considered whether the mere deed of the vendor, even backed by a good policy of title insurance to the purchaser, is the best possible security lawfully obtainable. It certainly is a vast improvement over the old method in simplicity, safety and cheapness, and, indeed, in the present conditions of business, conveyancing under the old system would be practically impossible. Absolute security to the investor would be an indefeasible title, and the last extreme of cheapness would do away with all costs of transfer. This is hardly thought possible

as to land transfers, although it has been for years attained as to corporate bonds and stocks. Millions of dollars are paid daily to buy stocks; the buyer never gives a thought as to the possibility of failure of title in the vendor. The investor in 10,000 shares of Pennsylvania Railroad stock, worth \$700,000, gets a certificate from the corporation that he is the owner of its stock to the amount of his purchase, which is practically indefeasible, and on which there are no costs of transfer whatever. When he gets his certificate, if he wishes to borrow money on it, he pins it as collateral to his note and has the note discounted at bank, and the loan is complete also without other costs than the interest or discount. It would certainly add greatly to the value of land if its sale and hypothecation were as cheap, easy and safe as that of corporate stocks and securities, and the laws of foreign countries may give some hints for improvement along these lines, as several of them pass titles practically indefeasible to the purchaser and at very cheap rates. The best known to the American student is the Australian law, often called the Torrens system, after its inventor. This law has been adopted in all the British islands of the Southern Pacific, as well as Australia, and also in many of the Canadian provinces. It has also been introduced as a voluntary system into the States of California, Oregon, Illinois, Massachusetts, Minnesota and Colorado and the Territories of Hawaii and the Philippines. Under this law, as generally framed in this country, the owner and possessor of land has the right to apply to court for leave to show his ownership to be absolute and in fee simple, and have it judicially declared so. The court refers the petition with its accompanying surveys and muniments of title to an examiner, whose duty it is to call all known parties in interest before him by notice and to advertise for unknown claimants; a hearing is had, the title is examined; if the title of the petitioner is found to be good, as claimed, it is on final decree declared to be absolute and indefeasible in him, and the legal effect of the decree is to bar all claims adverse to the petitioner within a very limited time after the

decree. Subsequent conveyance is by transfer in whole or part of this decree, by certificate issued by the Recorder of Deeds, called purchasers or mortgage certificates, and recorded in special books in the Recorder's office. If claimants adverse to the petitioner's title appear after their estates have thus been taken from them, and given to the petitioner, they have the right to be compensated for their loss out of a fund raised for the purpose by a tax on each petition, which is called the "assurance fund." This law has been much discussed, but has not generally attracted confidence. The most notable exception seems to be its success and popularity in Massachusetts, owing probably to the respect which is felt for, and richly deserved, by the very able and learned judges of the Land Title Court of that State. The reason of the failure of this law seems to be that the costs of the judicial process are considerable, and careful lawyers are by no means sure that the titles under it are absolutely indefeasible. There has been very little litigation on the constitutionality of the law, but its provisions barring the holders of estates adverse to the petitioner, and turning the claimant over to redress in money, very nearly resembles the taking of private property away from its owner for the mere purpose of giving it to the petitioner, which, however permissible in Canada and Australia, where there is no constitutional prohibition on the point, seems to conflict with the general American legal principle, which prohibits the taking of private property from its owner, except for public use. The point has not yet been raised or decided in the courts, but on principle the mere statement of it seems unavoidably to suggest that, as the time in which the claimant is barred in the proceeding under the Torrens law is twenty years shorter than the time prescribed in the general statute of limitation as to lands not under the act, it is to this extent a mere attempt at confiscation of the estate of the absent owner in favor of the petitioner, a denial of "the equal protection of law" provided by the Fourteenth Amendment of the Constitution of the

United States, and is also in this State within the constitutional prohibition of special legislation.

The German law on this subject is drawn on very exact lines, has been in operation for a long time, and has gradually developed from a system of transfer by the spoken word of the parties in the presence of the magistrate, noted at once by him on the public record, which prevailed in the Middle Ages and was similar to the English copyhold tenure. It has been adopted for the entire German Empire by the Code of 1900.

The foundation of this system is a public official survey of each judicial district, a set of maps or plans showing as matter of public record each lot of ground separately owned, numbered and referring to an index which shows the names and addresses of the persons in possession and assessed for taxation as owners of the same. This record is called the "Cadaster," and is very much like the sets of plans and indexes of Philadelphia, kept by the Bureau of Surveys, and called the "Registry of Surveys." The next step is to establish a court of which the Cadaster is a record for the special purpose of recording by regular judicial process the title of each land-owner in the district, who, being registered as such in the Cadaster, produces his title papers, showing his ownership and all known adverse claims and encumbrances, proves his possession accordingly and is thereupon decreed to be the owner; a certificate of the decree is given to him, and a separate record of title is kept as to each lot of ground. This recording of the title does not, however, have any curative effect on any flaw in it, does not bar any adverse claimant or insure the owner, or any claimant from loss, or create any governmental liability to insure or compensate any one interested. The title, after being recorded, is the same as it was before, but from the time that the title is recorded all claims and liens of every kind adverse to the recorded title and all transfers of it, either by purchase or descent, must be regularly entered by the court's order in the proper Record of Title, and such unregistered claims are

absolutely void, becoming valid only from the time of registry. Thus each record of title is a continuous judicial proceeding, a lawsuit which is continued indefinitely, and in which each claimant, lien holder and transferee must appear as a party and have his right to the land judicially determined and entered of record as to each lot concerned. The result of the establishment of this system is that after it has been in operation for a period longer than the lawful time in which suits may be brought, all outstanding adverse claims have either been placed upon the proper record or have been barred by the Statutes of Limitation, and thus the land titles become indefeasible, except as to claims registered on the proper Record of Title. In this manner absolute certainty of title and security to purchasers, lien creditors and heirs are finally reached without the expense of assurance funds, without insurance of title either by the government or by private enterprise, and without danger of unjustly barring absent claimants or taking any other revolutionary steps of any kind.

This system is noted for the safety it gives to the lender of money on landed security and the speed and ease with which money is so raised. An inspection of the record shows at once on a separate column of the register the exact state of the title as to liens. A petition for the entry of a mortgage or other lien, as agreed, is presented and the decree granted by consent, the lien is entered of record, a certified copy of the decree given to the creditor, the money is loaned and the transaction completed, often on the same day the loan is agreed to. The mortgage is, as with us, accompanied by the bond of the debtor, but the lien may be entered, if desired, without such bond. In this case the land only is liable for the indebtedness, and for this reason the lien is called a "ground debt." These may be drawn payable to order, like a promissory note, in which case the title passes by endorsement of the certificate, but without liability on the part of the endorser; or they may be drawn payable to bearer, in which case the title passes by delivery, as if it were a bank note.

The certificate must state with exactness the true amount of the debt secured, its terms as to interest and payment, and the number of the lot liened on the Cadaster, and the Title Register. It also states on one side the assessment for taxation of the land liened, with a parallel statement of all prior registered liens, thus giving an indication of the margin of security of the lender, or holder.

Under this system, which secures heirs and devisees as well as purchasers, each claim or transfer, whether a mortgage or other lien, a transfer on sale, or by descent or under a will, pays a small tax on registry. Under the law of Pennsylvania the direct heir becomes the owner of his ancestor's land, reaping where he has not sown and receiving by law the reward of the industry of others, absolutely free of all taxation, and the collateral inheritance tax is paid to the State treasury. In Europe all successions, upon death or will, are taxed, and part of each succession tax on land is paid for the registry of the title. In this city the public expenses of conveyancing are borne entirely by the sales and mortgages, while in Europe heirs and devisees bear a fair share of this burden. The result is that under the German system the expenses of conveyancing upon sale and mortgage are very small, generally on a rate proportioned to the consideration, or amount of debt secured, and are in Germany and London less than one-fourth of the average cost here. The cost of entering liens upon ground debt is still less and is regularly carried on by banking companies formed for this purpose exclusively, somewhat similar to our building and loan associations, who lend in all amounts, large and small, so that the home of the working man is there a quick asset on which the small sums of money needed on the sudden calls of sickness or accident are quickly and easily raised and generally paid by instalments out of wages as earned.

The land law of Denmark is also suggestive to the student. Under this system transfer on sale was originally by deed from vendor to purchaser, as in England, but the parties joined in taking the deed to the court of the

district in which the lands lay and presented it for record. It was then read in open court at three successive terms, or sessions, when, if no objections to the transfer were made, the fact was noted and the deed ordered to be recorded by written decree, endorsed on it by the judge. It was then copied "word for word" by the Court Clerk in record books kept for that purpose, called "Protocols of Deeds," and was then returned to the purchaser. This process of judicial recording is very old, dating back to A. D. 1550, and was still the law at the time of the promulgation of the Code of Christian V, A. D. 1683. The legal effect of this conveyance was to transfer the title of the grantor without any assurance to the purchaser as to its validity. If the vendor undertook to sell more land or more title than he owned, he was liable in damages to the vendee, extending to a repayment of the purchase money and to very severe penalties in a criminal proceeding besides. More recent legislation has added to this judicial system the German cadastral survey and title register index above described, so that the deed is now returned to the grantee registered in the Cadastral Index, as well as recorded in the "Protocol," with the legal effect that it is absolute and indefeasible, except as to liens, claims and estates registered prior in date to the registry of the deed. As the Cadaster and Register are open to inspection, upon payment of a small sum, by any one who can show a proper business reason for examination, reference thereto by the intending purchaser or mortgagee gives all the needful information as to the title to the land in question, and also its location, area and situation as to adjoining owners and highways. Under both the German and Danish systems it is the duty of all persons dealing for the purchase of land, or negotiating loans on any kind of landed security to examine the public records. They are charged with notice of their contents, and failure to observe the same is at the risk of the person so failing. Doing so, however, he is safe, for unregistered claims are absolutely void. The laws of Sweden and Norway on this subject are said to be in a general way similar to the Danish system.

Another practical danger remains to be noticed. Following the English law, under which the delivery of the deed to the vendee by the vendor passed the title, and there being in England generally no recording of deeds, their possession was as important an indication of ownership as possession of the land itself, the owners of land or mortgages in this country are still lawfully permitted to hold their own title deeds. One result is that the owner is subject to the possible inconvenience and anxiety of having them destroyed by fire or other accident, lost, mislaid or stolen. A much more serious result is the danger of their being fraudulently dealt with, the notarial seals and signatures of the parties being easy for the forger to imitate—so easy, indeed, that there have been several striking and recent cases in the courts of this city of conviction for forgery of deeds, and it may almost be said that cheating by negotiating genuine mortgages, followed by forged assignments, is in our large cities a regular branch of criminal industry.

From the foundation of the colony, wills have been filed in the office of the Register and certified copies are sold to any person who wants one, the executor's copy being attached to his letters testamentary. No inconvenience has arisen from this, and if deeds and mortgages were also filed of record instead of being copied at length it would cause a considerable saving of expense in the Recorder's office, and the difficulties of the cheat and forger would be much increased. In several countries this is to some extent the rule of law. In Spain the mortgage is deposited with the Notary, the mortgagee receiving a certified copy, marked in some way to note it as the first copy, or mortgagee's copy, and some similar law prevails in France and Italy.

Whenever a man dies in this country, leaving property and a will, there is a good chance that some disappointed relative contests the will on the allegation that the testator was insane. As he is always dead when the question is raised, it can only be decided by the testimony of experts, who generally have never seen the person as to whom

they express the opinions which are accepted as evidence, and who are only too often willing to swear to opinions based on imagined, unproved or even disproved facts. The Spanish law meets this difficulty by permitting the testator to take his will to the notary, probate it fully and deposit it in a sealed envelope with that official. If there is the slightest doubt about the mental capacity, or freedom from improper influence of the testator, these questions must be judicially determined before probate is allowed, but as the testator is alive and on the spot, such questions are usually quickly and easily settled and the decree of probate, subject to the right of appeal and review, is conclusive on these points. If the testator changes his intentions as to his property, he can withdraw his will from judicial custody at any time and cancel it. If it is not withdrawn, on proof of his death the will is produced, the court opens the succession and appoints the proper legal representative. Under this law judicial contests as to the validity of wills are extremely rare, and as there is no sort of litigation in our law more wasteful of the court's time and the client's money, or more entangling to land titles while they are pending; it would seem to be a more civilized law than ours on this point.

The similarity between the old Danish system of conveyancing and our own is striking. Transfer of title in both is by the deed of the vendor. The deed is taken to the judge, which is the acknowledgment; it is read in open court, which strongly suggests the Oyez and proclamation of Sheriffs' deeds; the deeds are in each country recorded "word for word," and as to deeds of lands in this city, they are noted on the registry in the Department of Surveys, which closely resembles the best Danish and German Cadasters.

The acknowledgment and recording "word for word," of deeds were entirely unknown to the English law when Penn and his followers settled on the Delaware; and it seems probable that these legal precautions, well known and long established in the Scandinavian jurisprudence,

were suggested to the English colonists of Pennsylvania, by their Swedish neighbors. The natural development of conveyancing in Philadelphia would be along the lines of evolution of the Danish system,—namely, the establishment of a Registry of Land Titles by the extension of the present index in the survey books, so as to make it a register,—at first for information only—of all claims and liens of record against each lot, as well as all transfers of the ownership, as at present. These entries posted daily from the records would in a short time compose a Title Registry similar in form to the German and Danish land records. The next step would be to make this registry for information a public record importing verity, extending thereto the present rule of the recording acts which holds that unrecorded deeds, &c., are valid, *intra partes*, ONLY: to this extent following the German law, which gives to all registered claims the legal effect of judgments from the date of registry, and holding all claims that are within the land registry laws void until registered. This would give the entries on the Registry the needed legal status, so that they could be safely relied on by the investor of money, and the system would be completed by the registry of the estates of heirs and devisees, and placing jurisdiction of correction of errors in the registry in the proper Court on petition in the nature of a Bill in Equity.

Under the German and Danish systems, titles not being transferred by the delivery of a deed, but by a decree of court which executes the agreement of the parties, the written instrument of sale or mortgage is as short as our ordinary assignment of railroad stock. It may be interesting to those who are accustomed to the absurd and cumbrous form of our deeds to read a few of the European instruments of transfer. The following is the form used under the Hungarian law:

“Agreement of purchase and sale made between A B as vendor and C D as purchaser, on the day written below, on the following conditions:

“1st. A B sells and effectually conveys the land situate No. —— street, in Budapest, and inscribed in his name in the Land Register

of Budapest Title No. —, Cadastral Number —, with all the appurtenances, free from all encumbrances, for the sum agreed upon to C D who on his part purchases and effectually takes possession of the said land and appurtenances for the sum of —" (consideration).

"2d. The purchaser having paid the full amount of the purchase money, the vendor acknowledges receipt thereof and hereby consents that the right of ownership of the land entered in his name as above may, without any further negotiation with him, be transcribed and incorporated in the said Land Register in the name of the purchaser.

"3d. All fees and stamp duties connected with this agreement shall be borne by —.

"Given at Budapest (date). (Signed) A B, C D."

The following is the official record of the spoken conveyance of land, which has been in use in certain parts of Germany ever since the Middle Ages, and was introduced into Prussia in 1872:

"Volume of Court Record No. —, Page —, of (place) (date) There appeared this day A B of —, and C D, of —. There was no doubt as to their capacity to contract and they were personally identified by —. The said A B declared as follows: I am the registered owner of the property situate at —, registered under No. —, Vol. —, Page —, in the Land Register. As such owner, I hereby consent to the Registration of C D, of —, as owner of the said property. The said C D applied to be registered as owner. The costs of registration are to be borne by the said —. The value of the property is stated to be (sum). (Signed) A B, C D."

The written transfer, which under the last English Statute for Registry of Land Titles, has replaced the deed of the vendor as to all sales of land in the County of London, is as follows:

"District of —, Parish of —. No. of Title —. I, John S., of — (merchant), this — day of —, 190—, in consideration of £—, hereby transfer to James B—, of — (hatter), the land comprised in the title above referred to. Signed, sealed and delivered by the said (vendor) in the presence of —. (Signed) John S—. (Seal)."

The instruments of mortgage or lien are equally brief and void of technical language, the written instrument being nothing more than a request for transfer or alteration of the registered ownership in accordance with the agreement of the registered owner and the vendee, so that the above forms are, in effect, an agreement, and a bill in equity praying the proper court to decree specific performance thereof and execute the decree by judicial process. The presenting of the writing to court files the

bill in an existing proceeding in rem, and the decree of transfer approves the agreement and at the same time transfers the title, and registry of the decree on the proper index places it conclusively upon a public record, of which all persons interested are lawfully bound to take notice.

It must be admitted that this system is superior to the laws of conveyancing which prevail in the various States of the Union, and that it is becoming acknowledged to be superior generally is shown by its adoption in various countries, replacing older systems. As above described, it has been engrafted on the law of Denmark, Norway and Sweden; it is now the law of the entire German Empire, Austria and Hungary, replacing the notarial system of the French law in Wurtemberg and the Rhine provinces in Germany, and the local customs of Tyrol, Carinthia and Dalmatia in Austria; it has been adopted in Russia; Japan has given up her feudal system of land law and taken it instead; it has been introduced into the English law, being now compulsory in the city of London, and its adoption in France is being seriously considered.

The method of conveyancing which prevails here, apart from our custom of title insurance, is curiously like the Chinese. There, as here, land is conveyed by writing, sealed and delivered by the vendor. The principal difference is that the Chinese law, which is 2000 years old, largely treats the family, rather than the individual, as the legal unit, and accordingly land was at one time owned by the family, and not solely by the occupant. This ancient rule has been modified, but it is still necessary to recite in the deed that the vendor, needing money, offered to sell his land to the various members of his family, but that they all declined to buy it, whereupon he offered it to the vendee, who agreed to purchase the same. This may seem absurd, but it is not more so than the *habendum* of our own form. The deed is taken by the parties to the court of the village, or town magistrate, and they are duly identified and acknowledge execution of the instrument before him; this is duly certified in writing on the deed by the magistrate, and it

is then sent to the office of the district or provincial magistrate, where it is registered in a special public record. This registry is also certified on the instrument, so that the vendee of land in China receives as his muniment of title the written and sealed act of the vendor, with official acknowledgment and registry, duly certified on the deed itself. These certificates are always written and sealed in red ink, and the instruments are therefore called "Red Deeds," and the Chinese red deed has the same lawful validity as our acknowledged and recorded conveyance. Deeds not certified are in China called "White Deeds," and these not being registered are not valid as against third parties or registered claims.

Legislation in America is carried on without sufficient reference to the works of the very learned and accomplished jurists of other ages and countries. The problems of civilized progress which confront the American lawyer have nearly all been met and solved by the other nations of the world which are equally civilized: and reference to their works on law and legislative enactments would be a great assistance to the student of history, of social life, of law, and of progressive legislation. Unfortunately these works, some of them very celebrated, have not generally been translated into English: and the researches of the student are therefore, at present, necessarily limited. It is probably for this reason that with all the progress that has been made and the good work that has been done, Conveyancing in the United States is still conducted on a plan which has been or is being abandoned in every civilized country and is followed only by the nation most conspicuously sunk in narrow and decadent conservatism.

CHARLES WETHERILL.